89- 1509

Supreme Court, U.S.
FILED
1989
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JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF UNITED STATES
October Term 1989

RICHARD J. WAGNER, Petitioner
V.
U. S. BANKRUPTCY COURT, N.E.D., PA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RICHARD J. WAGNER, pro se
R. D. # 1, Box 1502
Pottsville,,Pa. 17901

DATE: November 1, 1989

25 pp

QUESTIONS PRESENTED

1. After the U. S. Bankruptcy Court entered its order which dismissed the proceeding therein, and petitioner had filed a timely "MOTION TO MODIFY ORDER", was petitioner precluded from filing an appeal from that order until disposition of his motion by the court?

SUGGESTED ANSWER: Yes.

2. Did the U. S. District Court wrongfully deny petitioner's "PETITION FOR WRIT OF MANDAMUS"?

SUGGESTED ANSWER: Yes.

3. Absent disposition of petitioner's "MOTION TO MODIFY ORDER", is the bankruptcy proceeding still pending below?

SUGGESTED ANSWER: Yes.

4. Was petitioner denied due process and equal protcetion secured by the Constitution, Amendments 5 and 14(1)?

SUGGESTED ANSWER: Yes.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Richard J. Wagner (Wagner), pro se, and the respondent United States Bankruptcy Court, N.E.D., Pa, and defendant in adversary proceeding, the Pennsylvania National Bank and Trust Co. (Bank)

TABLE OF CONTENTS

		Page
QUESTIONS PRESENTED		i
LIST OF PARTIES		ii
OPINION BELOW		1
JURISDICTION		2
STATUTE INVOLVED		2
STATEMENT OF THE CASE		3
REASONS FOR GRANTING THE WRIT		9
CONCLUSION		10
APPENDIX		
11-10-88	"MEMORANDUM AND ORDER" by U.S. Dist. Ct., N.E.D. Pa	1a
5-12-89	"JUDGMENT ORDER" of U.S. Court of Appeals, 3C	8a
6-5-89	Denial of Petition For Rehearing by U.S. Ct. App. 3C	9a

TABLE OF AUTHORITIES

Page

CASES:

Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384, 74 S. Ct. 145, 98 LEd 106 5

Kerr v. U.S. District Court, 426 U.S. 394, 403 (1976), citing Roche v. Evaporated Milk Assn., 319 U.S. 21, 26 (1943) 6

OTHER:

U. S. Constitution, Amendment 1 8

U. S. Constitution, Amend. 5 & 14(1) i, 8

U. S. Bankruptcy Rule 7052(b) 2, 3, 4, 5

U. S. Bankruptcy Rule 8002(b) 2, 3, 5

U. S. Dist. Ct.,N.E.D. Pa. Rule 20(c) 7

F.R.C.P. 36(a) 7

IN THE SUPREME COURT OF UNITED STATES

October Term 1989

RICHARD J. WAGNER, Petitioner

V.

U. S. BANKRUPTCY COURT, N.E.D., PA.

PETITION FOR A WRIT OF CERTIORARI.
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Wagner respectfully prays that a writ of certiorari issue to review the order of the U. S. District Court, N.E.D., Pa., entered on 11-10-88, and affirmed by the U. S. Court of Appeals, 3C, on 5-12-89, and which denied Petition For Rehearing on 6-5-89.

OPINION BELOW

On 11-10-88 the U. S. District Court entered its "MEMORANDUM AND ORDER". R. 1a.

No opinion was rendered by the U. S. Court of Appeals, 3C.

JURISDICTION

The Judgment Order of the U. S. Court of Appeals was dated 5-12-89 (R. 8a) affirming the District Court order entered on 11-10-89. A timely PETITION FOR REHEARING was denied on 6-5-89. R. 9a.

On 9-9-89 Justice William J. Brennan, Jr., ordered that the time for filing this petition for writ of certiorari to be extended to and including 11-2-89.

This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATUTE INVOLVED

U. S. Bankruptcy Rule 8002(b):

(b) Effect of Motion on Time for Appeal. If a timely motion is filed in the bankruptcy court by any party: (1) for judgment notwithstanding the verdict under Rule 9015; (2) under Rule 7052(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 9023 to alter or amend the judgment; or (4) under Rule 9023 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect; a new notice of appeal must be filed. No additional fees shall be required for such filing.

STATEMENT OF THE CASE

On 9-25-85, Wagner filed a voluntary petition in the U. S. Bankruptcy Court, N.E.D., Pa., to No. 4027T.

On 4-11-86, Wagner filed his Complaint in Adversary Proceeding to No. 86-0299, against the Bank.

On 6-4-86, Bankruptcy Judge Twardowski dismissed the voluntary petition No. 4027T.

On 6-9-86 Wagner filed his "REQUEST FOR ADMISSIONS" to No. 86-0299, directed to and served on the Bank.

At this point in time of the proceedings, Wagner had to elect whether to file a motion to modify the 6-4-86 Order under Bankruptcy Rule 7052(b) and 8002(b) or appeal.

Wagner elected to file such motion.

On 6-13-86, Wagner did file his timely "MOTION TO MODIFY ORDER", to No. 85-4027T.

The Bankruptcy Court failed to dispose of that motion. It is still pending, hanging in limbo, suspending the case in limbo to the grave prejudice of Wagner.

On 8-13-86, WAGNER'S MOTION FOR SUMMARY JUDGMENT" was filed to No. 86-0299, and served on the Bank, to which it did not respond.

Since the MOTION TO MODIFY ORDER was filed on 6-13-86, Wagner made many written requests to the Bankruptcy Court to act on that motion. Every one of those requests were ignored, in effect refused. This clearly represents an impermissible judicial usurpation of power, suspending the case in limbo.

In that motion Wagner specifically invoked Rule 7052(b) to amend or make additional findings of fact.

Mandamus has traditionally issued in response to abuse of judicial power. Thus

where Bankruptcy Judge Twardowski refused to act on the motion, mandamus was the only remedy. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384, 74 S. Ct. 145, 98 L.Ed. 106.

According to Rule 8002(b), an appeal would be without effect while the MOTION TO MODIFY ORDER remains unresolved, which more fully appears in Rule 8002(b) excerpted as follows:

(b) Effect of Motion on Time for Appeal. If a timely motion is filed in the bankruptcy court by any party: (1) for judgment notwithstanding the verdict under Rule 9015; (2) under Rule 7052(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 9023 to alter or amend the judgment; or (4) under Rule 9023 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect; a new notice of appeal must be filed. No additional fees shall be required for such filing.

Therefore, on 2-5-87, Wagner was compellled to,file his "PETITION FOR WRIT OF MANDAMUS" in the U. S. District Court for relief requesting it to Order the Bank-

ruptcy Court to resolve the motion.

Wagner had,

> "no other adequate means to obtain relief he desires".

Kerr v. U. S. District Court, 426 U.S. 394, 403 (1976), citing Roche v. Evaporated Milk Association, 319 U.S. 21, 26 (1943).

On 11-10-88 Judge Huyett of the U.S. District Court entered his "MEMORANDUM AND ORDER" (R. 1a) which dismissed the "PETITION FOR WRIT OF MANDAMUS", erroneously holding that,

> "If the bankruptcy judge erred in dismissing the petitioner's case, the petitioner's remedy was a direct appeal of the order of dismissal, not a petition for mandamus." R. 5a.

Furthermore, the Bank failed to respond to Wagner's "REQUEST FOR ADMISSIONS", which are therefore deemed admitted by operation of F.R.C.P. 36(a) from which the following applicable pertinent part is excerpted:

> "The matter is admitted unless, within 30 days after service of the request ,...the party to whom the request is

> directed serves upon the party requesting the admission a written answer or objection addressed to the matter, is signed by the party or by the party's attorney...."
> --F.R.C.P. 36(a)

In addition, "WAGNER'S MOTION FOR SUMMARY JUDGMENT" was served on the Bank and filed on 8-13-86. The Bank made no response to it. Thus, it is deemed uncontested.

> "In the absence of timely response, the motion may be treated as uncontested."
> --U.S. District Court, N.E.D., Pa., Rule 20(c).

The documented simple indisputable controlling facts set forth above with brevity and specificity, conclusively show that the central issues are:

a. The bankruptcy court wrongfully failed to enter summary judgment in favor of Wagner as requested in the Wherefore Clause in the Adversary Complaint against the Bank. Wagner was entitled to

judgment because the Bank had failed to respond to Wagner's "REQUEST FOR ADMISSIONS"; the Bank had failed to respond to "WAGNER'S MOTION FOR SUMMARY JUDGMENT"; and because the Bank had failed to respond to Wagner's "MOTION TO MODIFY ORDER".

b. The bankruptcy court did not grant, dismiss, or otherwise dispose of Wagner's "MOTION TO MODIFY ORDER". Any assertion to the contrary is patently false.

The foregoing facts are of great moment. They conclusively establish the break down of the court processes which give rise to the Constitutional,

a. Question of Wagner's right "to petition the Government for a redress of grievances", under the First Amendment; and to the,

b. Question of Wagner's right to "due process" and "equal protection of the laws", secured by Amendment 14(1).

REASONS FOR GRANTING THE WRIT

The processes of the courts have broken down.

It is the purpose of this Honorable Court to secure rights and uniformity of judgments.

In a sense, petitioner is litigating a class action, that he not only represents himself, but tremendously important principles upon which are based the plans, hopes and aspirations of a great many people throughout the country.

FIRST, the questions are substantial. SECOND, the questions were properly raised below. THIRD, the decisions below cannot be sustained on any independent ground of law.

Wagner submits, the decisions below are in flagrant conflict with fundamental laws and with decisions of this Court and are plainly wrong.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the U. S. District Court, N.E.D., Pa.; and the affirmance thereof by the U. S. Court of Appeals For The Third Circuit.

Respectfully submitted,

DATE: 11-1-89.

RICHARD J. WAGNER
R.D. #1, Box 1502
Pottsville, Pa. 17901

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD J. WAGNER

v.

UNITED STATES BANKRUPTCY COURT

FILED NOV 10 1988

CIVIL ACTION
No. 87-0679

ENTERED: 11-10-88

CLERK OF COURT

MEMORANDUM AND ORDER

HUYETT, J. November 9, 1988

Richard Wagner filed this pro se petition for a writ of mandamus to compel the Bankruptcy Court to adjudicate his Chapter 13 bankruptcy petition.

Facts

Wagner filed his bankruptcy petition on September 25, 1985. However, Wagner did not file with his petition, or within fifteen days of the filing of his petition, the schedules and Chapter 13 statement required under Bankruptcy Rule 1007[1]. The docket sheet for Wagner's bankruptcy case reveals that in the following months, Wagner never

filed the required materials, although he did file several motions to clarify or vacate the court's orders. On April 11, 1986, he also filed adversary action against creditor Philadelphia National Bank (PNB). See Bankruptcy Case Record, appended as Exh. C to Motion to Dismiss. On June 4, 1986, the Honorable Thomas M. Twardowski held a hearing on PNB's motion for relief from the automatic stay, following which Judge Twardowski dismissed the action.

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1. Bankruptcy Rule 1007(b) provides:

> The debtor in a chapter 13 individual's debt adjustment case shall file with the court a Chapter 13 Statement conforming to official Form No. 10 and, if the debtor is engaged in business, a statement of financial affairs prepared as prescribed by Official Form No. 8.

Bankruptcy Rule 1007(c) provides:

> The schedule and statements, if not filed in a pending case, shall be filed with the petition in a voluntary case, or if the petition is accompained by a list of all the debtor's creditor's and their addresses, within 15 days thereafter...

On June 13, 1986, Wagner filed in the bankruptcy court a "Motion to Modify 'Order'" and a "Statement of Assets & Liabilities as at (sic) 6-11-86." In this motion, Wagner sought thirty days to "perfect his pleadings." Citing Hanes v. Kerner, 404 U.S. 519 (1972), he asserted that Judge Twardwoski "failed to abide by the principle" that a pro se litigant "should be held 'to less stringent standards' than those of lawyers." Motion to Dismiss, Exh. A. Wagner did not appeal the dismissal of his bankruptcy petition.

Discussion

The remedy of mandamus is "a drastic one, to be invoked only in extraordinary situations" which amount "to a judicial usurpation of power." Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34-35 (1980).

> In order to insure that the writ will issue only in extraordinary circumstances, this Court has required that the party seeking issuance have no

> other adequate means to attain the relief he desires, and that he satisfy the "burden of showing that (his) right is 'clear and indisputable.'"

Id. at 35 (citations omitted).

In this case, the dismissal of Wagner's bankruptcy petition does not represent a "judicial usurpation of power" warranting an order of mandamus compelling adjudication of the petition. Rather, the action of the bankruptcy court was simply the enforcement of a procedural rule governing the filing of schedules and statements. See In re Dandy Doughboy Donuts, 66B.R. 457 (S.D.Fla. 1986)(dismissing Chapter 11 petition because of debtor's failure to file list of creditors and claims).

However much I may sympathize with the plight of pro se bankruptcy petitioners, I cannot relieve them of their duty to comply with filing requirements that are applicable to all Chapter 13 petitioners, whether

pro se or represented. See Mozur v. Pennsylvania Department of Transportation, 507 F. Supp. 3, 4 (E.D.Pa. 1980) ("(A) judge may not become the surrogate attorney for a party, even one who is proceeding pro se. A pro se plaintiff must abide by the Federal Rules of Civil Procedure and when confronted by motions to dismiss must articulate reasons why the motions should not be granted.")

If the bankruptcy judge erred in dismissing the petitioner's case, the petitioner's remedy was a direct appeal of the order of dismissal, not a petition for mandamus[2]. The latter remedy is reserved for situations in which the petitioner has "no other means to attain the relief he desires." Kerr v. U.S. District Court, 426 U.S. 394, 403 (1976), citing Roche v. Evaporated Milk Association, 319 U.S. 21, 26 (1943).

Furthermore, as the dismissal of Wagner's bankruptcy petition renders moot his adversary complaint against PNB, I cannot compel the adjudication of the action.

Therefore, I will grant the respondent's motion to dismiss the petition for mandamus. An appropriate order is attached.

S/ Daniel H. Huyett, 3rd,
Judge.

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2. The petitioner argues that he was not notified of the order dismissing his case. However, his "Motion to Modify 'Order'" refers expressly to the June 4, 1986 order

Bankruptcy Rule 8002(b) provides for a tolling of the ten day appeal period pending the resolution of motions under Rule 7052 "to amend or make additional findings of fact." However, although styled as a Rule 7052 motion, the petitioner's "Motion to Modify 'Order'" did not seek amended or additional findings.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD J. WAGNER

V.

UNITED STATES BANKRUPTCY COURT

CIVIL ACTION
No. 87-0679

ORDER

HUYETT, J. November 9, 1988

Upon consideration of the respondent's Motion to Dismiss the Petition for a Writ of Mandamus, the petitioner's response thereto, and the parties' memoranda, and for the reasons set out in the accompanying memorandum, it is ORDERED that the respondent's motion is GRANTED, and the Petition for a Writ of Mandamus is DISMISSED.

IT IS SO ORDERED.

S/ Daniel H. Huyett, 3rd, Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1032

WAGNER, RICHARD J.,
Appellant

vs.

UNITED STATES BANKRUPTCY COURT, N.E., D. PA.

Appeal from the United States District Court, Eastern District of Pennsylvania
(D.C. Civil No. 87-0679)
District Judge: Daniel H. Huyett, 3rd

Submit
May 10, 1989
Before: Mansmann, Hutchinson, and Van Dusen, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court entered November 10, 1988, be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

S/ Carol Los Mansmann,
Circuit Judge

May 12, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1032

WAGNER, RICHARD J., Appellant

vs.

UNITED STATES BANKRUPTCY COURT, N.E., D. PA.

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRCA, COWEN, NYGAARD, and VAN DUSEN, Circuit Judges.

The petition for rehearing, filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. S/ Carol Los Mansmann, Cir. Judge.

June 5, 1989.